IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs October 28, 2003

RUSSELL WAYNE CANTER v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Sullivan County
No. C46,610 Phyllis H. Miller, Judge

No. E2003-00654-CCA-R3-PC
March 30, 2004

The petitioner, Russell Wayne Canter, pled guilty to second degree murder by distribution of a Schedule I controlled substance (heroin). See Tenn. Code Ann. § 39-13-210(a)(2). Pursuant to the plea agreement, the trial court ordered a sentence of eighteen years in the Department of Correction. In this post-conviction proceeding, the petitioner claims that his trial counsel was ineffective and that his plea was not knowing and voluntary. The post-conviction court denied relief. That judgment is affirmed.

Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed

GARY R. WADE, P.J., delivered the opinion of the court, in which JOSEPH M. TIPTON and ALAN E. GLENN, JJ., joined.

John D. Parker, Jr., Kingsport, Tennessee, for the appellant, Russell Wayne Canter.

Paul G. Summers, Attorney General & Reporter; Brent C. Cherry, Assistant Attorney General; and Barry Staubus, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The victim, Seth Guyer, died of a heroin overdose. At the submission hearing the facts supporting the guilty plea were stipulated as follows:

> Regina and Brian Belcher, Barbara Greer, [and] Nancy Canter . . . would testify that they were at . . . the defendant's [apartment] located on Lynnwood Avenue in Bristol, Sullivan County, Tennessee on October the 29th and 30th of 1998. The [s]tate's proof would have been . . . that . . . they were . . . intravenously shooting cocaine [with the victim and] . . . that the defendant left his apartment . . . to get heroin, that he came back, that he furnished heroin to [the victim] as well as Mr. and Mrs. Belcher and Ms. Greer. There would be testimony by one witness, Regina Belcher, that the defendant actually gave the injection of heroin to [the victim] . . . .

> The [s]tate's proof would be that [the victim] had been warned that this was hot heroin, and there would be proof that on a previous occasion he had been to an apartment of the defendant's and he [had taken] an overdose of heroin but had survived it.
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> Then the [s]tate's proof would be that shortly []after the heroin was injected into the veins of [the victim], . . . he began looking distressed, that he beg[a]n to turn blue, that he was put into a shower, he was iced down and given ice on his body, water, and that various people there . . . began to try to resuscitate him and give him CPR to keep him alive and several of those individuals left.
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> The [s]tate's proof wo[u]ld be that several of these individuals would testify that they urged [the defendant] to call 911 and take him to the hospital, but he was not taken. . . . 911 was not called.
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> The [s]tate's proof would be . . . that there was a call made about four . . . a.m. on October 30th from [the defendant's] house to an Allison Kelly, who was a nurse, [asking] her what to do and giv[ing] a description of [the victim]. The proof would be . . . that she urged [the defendant] to . . . either call 911 or to get [the victim] to the hospital . . . .
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> The testimony would be that subsequent to that . . . [the victim] died, and that he was in the apartment on Lynnwood Avenue.
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> The [s]tate's proof would be that Brian Belcher and the defendant took the body of [the victim], placed it in [the victim's] truck. They drove up to this . . . remote area of 421 and they placed his body there. There was a syringe placed next to his body and . . . following them would have been Nancy Canter and Regina Belcher and . . . the body was left there and they initially . . . [told] police . . . that [the victim] had left on his own to go to Hickory Tree, they did not know where he was at.

There was no direct appeal. A motion for reduction of sentence was denied in November of 2001. In June of 2002, the petitioner filed a pro se petition for post-conviction relief alleging that his guilty plea was neither knowingly nor voluntarily entered and that his trial counsel had been ineffective. The post-conviction court appointed counsel, who filed an amended petition alleging that trial counsel was ineffective for failing to adequately explain certain of the evidence to the petitioner, failing to develop evidence that the victim's death was caused by the ingestion of drugs other than heroin, failing to establish evidence that "the [victim] was a well known drug addict and dealer," and failing to accurately advise him regarding the elements of the charged offense and diminished capacity. The amended petition also contained allegations that the petitioner's guilty plea was involuntary and unknowing because it was coerced by trial counsel "under a threat of more jail time."

At the hearing on the post-conviction petition, the petitioner, who is approximately fifty years of age, testified that he wanted a jury trial but agreed to plead guilty after trial counsel advised him that he was facing a potential sentence of forty years. He recalled that the state initially presented him with an offer of twenty years and that he then asked trial counsel if he couldn't "do a little bit better." The petitioner stated that when trial counsel later returned with an offer of eighteen years, which he had to accept or reject by the next day, he responded, "'Well, . . . if that's the best you can do, I guess I'll have to take it.'" He recalled that he was given overnight to further consider the state's offer. The petitioner testified that he believed that trial counsel was ineffective for concluding that a doctor who had opined that the victim died of a combined acute overdose of heroin and cocaine would not have been helpful to the defense. The petitioner, who denied having provided the victim with cocaine, contended that the victim was a long-time addict who had built up a tolerance to heroin and that the defense should have established that the amount of heroin in his system was not sufficient to kill him. He stated, "[The victim had] done drugs longer than I had, and . . . I don't see how it would have killed him when I done the same shot he did." While the petitioner acknowledged that at the time of the plea he understood that the service of his sentence would be at one hundred percent, he insisted that he was unaware that he would be classified as a violent offender, resulting in further restrictions, until he arrived at TDOC.

The petitioner testified that trial counsel had interviewed a variety of witnesses but claimed that he failed to provide him with copies of their statements. According to the petitioner, when he received the written statements after his guilty plea, he discovered that the witnesses were much more helpful to the defense than trial counsel had anticipated. He stated that he could not understand how he could have had the requisite intent to qualify for a second degree murder conviction because "that would have meant I was trying to commit suicide, because I done the same amount that he did before he did." The petitioner recalled that he had asked trial counsel about a possible diminished capacity defense because he was so "strung out and warped" on drugs himself but was advised that the strategy would not work because he had voluntarily ingested the drugs. He maintained that although he did not understand all of the ramifications of his plea, he nevertheless "went with the flow," explaining that "I'd have felt like an ass sitting down there saying I don't know what I'm doing."

During cross-examination by the state, the petitioner acknowledged that he had physically injected the victim with the heroin but contended that the victim had prepared the dosage. While conceding that the doctor who performed the autopsy would have testified that the heroin was the sole cause of the victim's death, the petitioner also admitted that after the victim's death he moved the body to a mountainous area and "left the syringe in there so whoever found him would know that he'd been doing drugs." He testified that Regina Belcher removed some illegal drugs from the clothing of the victim. The petitioner acknowledged that trial counsel had reviewed the entire plea agreement with him, that he had signed the form, and that he had responded affirmatively to the trial court's questioning at the submission hearing. He testified that he was not under the influence of any alcohol or drugs and that although he knew that service of one hundred percent of his sentence would be required, he was not aware that he might be classified as a violent offender in the Department of Correction, resulting in additional restrictions within the prison system. The petitioner acknowledged that the plea agreement allowed for a ten-year sentence in an unrelated drug case to be served concurrently.

Trial counsel, who has practiced criminal law since 1976, testified that he took the case over from the public defender's office, that he obtained their office file, and that he consulted with the attorney who had been previously assigned to represent the petitioner. Trial counsel recalled that as a part of his preparation he had reviewed the transcript of a previous trial involving the petitioner, which included the testimony of Regina Belcher, who was also a witness in this case. He remembered discussing that information, as well as the state's discovery responses and witness statements, with the petitioner in advance of the plea. According to trial counsel, he had provided the petitioner with a copy of every witness statement in his possession prior to the plea agreement. He also recalled that after the plea, the petitioner's mother had requested copies of various documents, including the statements. He testified that he was absolutely certain that he had previously provided those same materials to the petitioner. While conceding that the petitioner had developed a list of potential defense witnesses, trial counsel explained that he was unable to locate any of those witnesses because the petitioner had no clue as to their whereabouts. While trial counsel did learn that Regina Belcher may have been working as a dancer at one of the local nightclubs, he was unable to obtain any more specific information. He described the petitioner's wife as very helpful and recalled that she did not expect the other witnesses to be cooperative for fear of being charged in the offense.

Trial counsel stated that the petitioner, who claimed to have no recollection of administering the illegal drug to the victim, had acknowledged that it was his practice to inject heroin if asked. He remembered that he had discussed with the petitioner both his right to remain silent and his right to testify, specifically addressing the harmful admissions that he would have to reveal and the likely impeachment by his previous convictions. Trial counsel testified that, in his opinion, the petitioner would have been convicted if he admitted actually injecting the illegal drug. He remembered that he reviewed the autopsy report "word-for-word" with the petitioner. Trial counsel, who received funds to employ a forensic pathologist to assist with the defense, testified that the pathologist's initial written report was helpful to the defense but failed to include some information that adversely affected the value of his opinions. He specifically recalled that when he telephoned the pathologist to discuss the report, he discovered that the pathologist would have to admit under oath that there was more than enough heroin in the body to have caused the victim's death.

Trial counsel testified that he was "very much concerned" that the evidence would easily support a jury finding that the petitioner acted recklessly. It was his opinion that the state would be able to prove that the victim had previously "crashed" while using heroin with the petitioner. When trial counsel questioned the petitioner as to why he would have injected the victim with heroin under those circumstances, the petitioner replied, "'Man, I don't really know. I mean, he wanted it. I just gave it to him. You know, it's not my job to do things right or wrong, it's just if they want to use it, I let them use it." Trial counsel had no recollection of discussing diminished capacity with the petitioner because he believed that it was not applicable given that any intoxication on the part of the petitioner was voluntary. He also thought that the petitioner's actions in calling a nurse for advice and disposing of the victim's body belied his claim of intoxication. Trial counsel remembered that the nurse would have testified that she told the petitioner no fewer than four times that the victim needed to be taken to a hospital. While denying that he exerted undue pressure on the petitioner to accept the plea offer, trial counsel did admit advising the petitioner that if he were convicted and sentenced by the trial court, he could receive a twenty-five year sentence which would be served consecutively to his previous ten-year sentence. Trial counsel recalled that the petitioner responded that he had "done well" in the penitentiary and that "if he was looking at thirty-five years as opposed to eighteen . . . he thought he'd better take the eighteen." Trial counsel remembered advising the petitioner of all of his rights and the nature of an Alford plea, which was permitted by the terms of the plea agreement. It was his testimony that the submission hearing did, in fact, take place on the day following the acceptance of the offer.

In a thorough written order specifically accrediting the testimony of trial counsel over that of the petitioner, the trial court denied relief, ruling as follows:

> [T]he [c]ourt finds that [trial counsel] investigated the case thoroughly, that [the] testimony [of the retained forensic pathologist] would not have been favorable for the [petitioner], and that [trial counsel] advised the [petitioner] correctly as to legal issues in the case.
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> The [p]etitioner has apparently confused T.C.A. § 39-13-210(a)(1), which stated that "second-degree' murder is a knowing killing of another" with T.C.A. § 39-13-210(a)(2), which states that "second-degree murder is killing of another which results from the unlawful distribution of any Schedule I or Schedule II drug when such drug is the proximate cause of death of the user." As part (a)(2) does not require a culpable mental state, the murder can be committed intentionally, knowingly, or recklessly. . . .
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> [A]s second degree murder by distribution of drugs can be committed recklessly, evidence of voluntary intoxication would not serve to negate any required mental state.
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> Further, the [c]ourt finds that at the guilty plea hearing as he stated under oath, the [p]etitioner fully understood the nature of his actions, his rights, that he was voluntarily and knowingly waiving his rights, and that he had not been coerced or pressured into pleading guilty. The [c]ourt does not find the [p]etitioner's testimony credible that he pled guilty to eighteen years at 100% and didn't tell the [c]ourt he didn't understand what was going on because he "would have felt like an ass."
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> The [p]etitioner . . . was forty-eight years old at the time of his guilty plea on July 13, 2001. . . . [H]e was no stranger to the courts – he had two prior misdemeanor convictions involving dishonesty (petit larceny and petty theft) and three prior felony convictions (aggravated battery with a deadly weapon, burglary, and possession of a Schedule II drug with intent to sell).
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> * * *
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> The [c]ourt finds that there is no requirement the [c]ourt or defense counsel advise the [p]etitioner regarding a Department of Correction[] classification. The [p]etitioner testified he knew he was pleading to eighteen years at 100% release eligibility with a possible sentence reduction credit of 15% and that being classified as a "violent offender" obviously could not increase his release eligibility. . . .

> In summary, the [c]ourt finds that the [p]etitioner entered his guilty plea . . . intelligently, knowingly and voluntarily and that he did receive effective assistance of counsel. Further, the [c]ourt finds that the evidence of the [p]etitioner's guilt of second-degree murder by distribution of a Schedule I drug was overwhelming. The [p]etitioner offered no credible proof that the result would have been any different if he had gone to trial. . . .

In a post-conviction proceeding, of course, the petitioner bears the burden of proving his allegations by clear and convincing evidence. Tenn. Code Ann. § 40-30-210(f) (1997).[1] Claims of ineffective assistance of counsel are regarded as mixed questions of law and fact. State v. Honeycutt, 54 S.W.3d 762, 766-67 (Tenn. 2001); State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). On appeal, the findings of fact made by the trial court are conclusive and will not be disturbed unless the evidence contained in the record preponderates against them. Brooks v. State, 756 S.W.2d 288, 289 (Tenn. Crim. App. 1988). The burden is on the petitioner to show that the evidence preponderated against those findings. Clenny v. State, 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978). The credibility of the witnesses and the weight and value to be afforded their testimony are questions to be resolved by the trial court. Bates v. State, 973 S.W.2d 615 (Tenn. Crim. App. 1997). When reviewing the application of law to those factual findings, however, our review is de novo, and the trial court's conclusions of law are given no presumption of correctness. Fields v. State, 40 S.W.3d 450, 457-58 (Tenn. 2001); see also State v. England, 19 S.W.3d 762, 766 (Tenn. 2000).

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, he must first establish that the services rendered or the advice given were below "the range of competence demanded of attorneys in criminal cases." Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Second, he must show that the deficiencies "actually had an adverse effect on the defense." Strickland v. Washington, 466 U.S. 668, 693 (1984). Should the petitioner fail to establish either factor, he is not entitled to relief. Our supreme court described the standard of review as follows:

> Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the defendant makes an insufficient showing of one component.

Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996). As to guilty pleas, the petitioner must establish a reasonable probability that, but for the errors of his counsel, he would not have entered the plea and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

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[1] In 2003, the Post-Conviction Procedure Act was renumbered within the Code. It now appears at sections 40-30-101 through 40-30-122.

When evaluating the knowing and voluntary nature of a guilty plea, the United States Supreme Court has held that "[t]he standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." North Carolina v. Alford, 400 U.S. 25, 30 (1970). The court reviewing the voluntariness of a guilty plea must look to the totality of the circumstances. See State v. Turner, 191 S.W.2d 346, 353 (Tenn. Crim. App. 1995); see also Chamberlain v. State, 815 S.W.2d 534, 542 (Tenn. Crim. App. 1990). Specifically, a reviewing court must consider the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial. Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993).

The petitioner first argues that trial counsel failed to adequately investigate the circumstances of the offense. Because the petitioner has not set forth any specific argument as to this issue, it could be considered waived. See Tenn. Ct. Crim. App. R. 10(b). Nevertheless, the record reflects that trial counsel conferred with the petitioner, obtained discovery materials from the state, interviewed available witnesses, and obtained funds to hire an expert pathologist for the defense. The post-conviction court specifically accredited trial counsel's testimony. Thus, the evidence does not preponderate against the post-conviction court's finding that trial counsel investigated the case "thoroughly" and competently prepared for trial.

The petitioner next argues that trial counsel was ineffective for failing to properly explain the plea bargain and his "actual sentence[]." Specifically, he asserts that he "had no idea he would not be released after serving eighty-five percent (85%) of his sentence and . . . did not understand that his activities at the prison would be greatly curtailed within the prison system due to his being convicted of a violent crime."

Initially, the petitioner's claim is belied in part by his own testimony at the post-conviction hearing, wherein he acknowledged that at the time of the plea he understood that he would have to serve one hundred percent of his sentence. Additionally, the transcript of the petitioner's guilty plea contains the following exchanges between the petitioner and the trial court:

> THE COURT: According to the [p]lea [a]greement[,] . . . you're pleading guilty . . . to second degree murder with a recommended sentence of eighteen (18) years, Range I standard offender. That's actually with a one hundred percent (100%) RED, but that – you can be given credits of up to fifteen percent (15%), which means that it cannot be any less than eighty-five percent (85%) of eighteen (18) years. Do you understand that?
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> [THE PETITIONER]: Yes, Ma'am.

* * *

> [THE COURT:] Now, your sentence of eighteen (18) years, what this means is, that you are not eligible for release until after you have served eighty-five percent (85%) of eighteen (18) years. Do you understand that?
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> [THE PETITIONER]: Yes, Ma'am.
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> * * *
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> THE COURT: Okay. Now, do you understand, too, that that eighty-five percent (85%) is just an eligibility, that nobody is promising you that you will get released after you serve eight-five percent of the sentence. Do you understand that?
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> [THE PETITIONER]: Yes, ma'am.

It is our conclusion, therefore, that the record supports the post-conviction court's determination that the petitioner had been advised of and understood his release eligibility date.

In the second part of this claim, the petitioner asserts that trial counsel was ineffective for failing to advise him that he would be classified as a violent offender by the Department of Correction. Although the petitioner argues that because of the classification his activities in the prison system are "greatly curtailed," the record is silent as to any specific curtailments. The petitioner does not cite any authority that would place a duty on trial counsel to provide advice as to potential classification by the Department of Correction. Moreover, there is no indication in the record that trial counsel gave the petitioner any erroneous advice in this regard. Under these circumstances, this court cannot conclude that trial counsel was ineffective. See Frank Crittenden v. State, No. M2002-01856-CCA-R3-PC, slip op. at 7 n.1 (Tenn. Crim. App., at Nashville, Nov. 20, 2003) ("Generally, once a prisoner is in the custody of the Department of Correction, an agency of the state government, classification status is addressable only through the avenues of the Administrative Procedures Act. Tenn. Code Ann. §§ 4-5-101 to -324 (1998).").

Finally, the petitioner asserts that trial counsel was ineffective for failing to explain intent, recklessness, proximate cause, malice, and diminished capacity to him, for failing to adequately communicate with him, and for coercing his plea of guilt with the threat of a possible forty-year sentence. In our view, the post-conviction court correctly observed that the petitioner was charged with second degree murder under Tennessee Code Annotated section 39-13-210(a)(2), defined as "[a] killing of another which results from the unlawful distribution of any Schedule I or Schedule II drug when such drug is the proximate cause of the death of the user." As such, evidence of intent, knowledge, or recklessness would have established the culpable mental state. See Tenn. Code Ann. § 39-11-301(c). Trial counsel's assessment that the petitioner could have been convicted of second degree murder as charged under the circumstances of the offense was accurate. Likewise, the record supports the post-conviction court's findings that trial counsel adequately communicated with the petitioner and that the petitioner's guilty plea was not coerced. The petitioner's own testimony establishes that his plea was in fact knowing and voluntary. In summary, the petitioner is not entitled to relief.

Accordingly, the judgment of the post-conviction court is affirmed.

GARY R. WADE, PRESIDING JUDGE